

distinctly claim and particularly point out that which Applicants consider to be their invention. Support for the amendments to claims 1, 4, 9, 11, 12, and 18 can be found throughout the disclosure. No new matter has been added by this amendment. Claims 13-17 and 19-20 have been withdrawn as the result of an earlier restriction requirement. In view of the Examiner's earlier restriction requirement, Applicants retain the right to present claims 13-17 and 19-20 in a divisional application.

## **II. Restriction Requirement**

The Examiner has repeated and made final the restriction requirement originally made in the Office Action mailed 9/03/2003. In a sincere effort to expedite prosecution and place this application in immediate condition for allowance, non-elected claims 13-17 and 19-20 have been cancelled without prejudice.

## **III. Rejection under 35 USC § 112, first paragraph**

Claims 1-12 and 18 have been rejected under 35 USC § 112, first paragraph as allegedly "containing subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventors, at the time the application was filed, had possession of the claimed invention". Office Action mailed November 24, 2003 ("Office Action") at page 2.

The Examiner asserts that the "genus includes a number of variants for which no written description is provided in the specification due to the language which permits sequences comprising fragments, regions, or cis elements" Office Action at page 3. The language in the claims to which the Examiner refers has been removed in view of the Applicant's amendment. The Applicant further notes that the Examiner acknowledges

that the Applicant “has express possession of only one sequence, SEQ ID NO: 81”.

Office Action at page 3.

Claims 1-12 and 18 have been rejected under 35 USC § 112, first paragraph “because the specification, while being enabling for SEQ ID NO: 81, does not reasonably provide enablement for fragments, cis elements or regions of SEQ ID NO: 81 as promoter elements”. Office Action at pages 5-6. .

The Examiner further asserts that “it would require undue experimentation for one of skill in the art to perform the method of the claim as broadly written” Office Action at page 10. Examiner also states that the rejections “rely upon the fragment, cis element and region language”. Office Action at page 11. The language in the claims to which the Examiner refers has been removed in view of the Applicant’s amendment. The Applicant further notes that the Examiner acknowledges that the specification is “enabling for SEQ ID NO: 81”. Office Action at page 5.

Applicants believe the rejection of claims 1-12 and 18 under 35 USC § 112, first paragraph has been rendered moot in view of the current amendments. Thus Applicants respectfully request withdrawal of this rejection.

#### **IV. Rejection under 35 USC § 102**

##### **A. Rejection under 35 USC § 102(a)**

Claims 1-3, 5, 8 and 11 have been rejected under 35 USC § 102(a) as being anticipated by Genbank Accession No. AP001526 (May 30, 2000). Office Action at page 11. The Examiner states that “Genbank Accession No. AP001526 teaches a nucleic acid which comprises 30 nucleotides of SEQ ID NO: 81”. Office Action at page 12.

Applicants believe that the amendment to the claims removes the basis for this rejection

since the claimed invention is now directed to an isolated nucleic acid comprising a sequence consisting of SEQ ID NO: 81 which is a 666 nucleotide sequence. Applicants believe the rejection of claims 1-12 and 18 under 35 USC § 102(a) has been rendered moot in view of the current amendments. Thus Applicants respectfully request withdrawal of this rejection.

**B. Rejection under 35 USC § 102(b)**

Claims 1-12 and 18 have been rejected under 35 USC § 102(b) as being anticipated by Zabaleta et al (Plant Journal 1998 15(1): 49-59). The Examiner states that Zabaleta teaches a nucleic acid which comprises a sequence which comprises ACCCACA which is 100% identical to the ACCCACA at positions 346-352 of SEQ ID NO: 81. Office Action at page 12. Applicants believe that the amendment to the claims removes the basis for this rejection since the claimed invention is now directed to an isolated nucleic acid comprising a sequence consisting of SEQ ID NO: 81 which is a 666 nucleotide sequence. Applicants believe the rejection of claims 1-12 and 18 under 35 USC § 102(b) has been rendered moot in view of the current amendments. Thus Applicants respectfully request withdrawal of this rejection.

**V. Conclusion**

In view of the foregoing amendments and remarks, Applicants respectfully request reconsideration of this application and the timely allowance of the pending claims.

If there are any additional fees due in connection with the filing of this Amendment, please charge the fees to Deposit Account No. 13-4125. If a fee is required

for an extension of time under 37 CFR § 1.136 not accounted for above, such an extension is requested and the fee shall also be charged to said Deposit Account.

Respectfully submitted,



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